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Nos. 03-1164, 03-1165

IN THE

Supreme Court of the United States

Ann M. Veneman, et al.,
Petitioners,
v.
Livestock Marketing Association, et al.

Nebraska Cattlemen Inc., et al.,
Petitioners,
v.
Livestock Marketing Association, et al.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

JURISDICTION

The petitioners correctly state this Court's jurisdiction over this case.

STATEMENT OF THE CASE

I. Background

1. The United States beef production industry is comprised of almost one million individual farmers and ranchers who sell cattle at prices determined by the laws of supply and demand. Pet. App. 54a. Characterized by free competition among proudly independent producers, the industry is the antithesis of a collectivized market.[1] Yet pursuant to the Beef Promotion and Research Act, 7 U.S.C. 2901 *et seq.* (Beef Act), producers must finance an industry-run generic beef promotion program that the government paternalistically deems to be in their collective interest. This suit arises because respondents, South Dakota and Montana ranchers and organizations representing their interests,[2] object to this

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[1] Although the beef industry is subject to some regulation, most of it does not govern the *production* phase, and none of it undercuts the competitive nature of the industry—rather, most beef regulation is affirmatively *pro-competitive.* The Packers and Stockyards Act, 7 U.S.C. 181 *et seq.*, the primary federal statute regulating the beef industry, aims principally to prevent collusion, price manipulation, and other anticompetitive practices on the part of packers, livestock dealers, and stockyards. See *id.* § 192. See also, *e.g.*, *id.* § 1635 (requirement that buyers report prices is intended to "encourage[] competition"); 21 U.S.C. 602 (inspections at processing and slaughter stage preserve fair competition by preventing faulty products from being marketed at below-competitive prices). The government's beef grading system is wholly voluntary. See 7 U.S.C. 1621 *et seq.*

[2] Respondent Livestock Marketing Association (LMA) is an association of livestock markets—that is, auction yards and other

"checkoff" requirement, which compels them to finance speech with which they disagree and to associate for expressive purposes with industry organizations they have refused to join.

The promotions issued pursuant to the Beef Act are generic in character—meaning that, among other things, they do not distinguish between the grain-fed U.S. beef produced by respondents and the grass-fed beef produced abroad, which respondents regard as inferior. Respondents object to this simplistic "beef is good" message, which obscures the quality differences between U.S. and foreign beef. Beyond the economic perversity of being forced to promote their foreign competition, respondents object to the fact that the promotions are expressly attributed to them through messages, which appear in each television and print advertisement, identifying the ads as "funded by America's Beef Producers."[3] And because respondents, like many cattle producers, place a premium on their independence from the government and its controls and exactions, they are *especially* offended to the degree that these messages are deemed "governmental" in character. J.A. 196.

Respondents also object to being forced to associate for expressive purposes with the various organizations, ranging from wholly private to quasi-governmental in nature, involved in collecting and spending their checkoff dollars, including the National Cattlemen's Beef Association (NCBA), the Cattlemen's Beef Board, and beef councils in various states. See *infra* at 4-5. Those associations advance messages—including, but not limited to, the generic promotions

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entities that facilitate sales, collect "beef checkoff" assessments, and remit them to the seller's state beef association. Respondent Western Organization of Resource Councils (WORC) is an association of grassroots organizations that seek to protect family farms.

[3] J.A. 50-52 (also bearing the copyright of the "National Cattlemen's Beef Association and Cattlemen's Beef Board"). The government is not mentioned.

themselves—that respondents believe are harmful to small, independent cattle producers. J.A. 197, 201, 204, 215-16, 218-19. NCBA, in particular, takes partisan political positions—endorsing President Bush's reelection, for example.[4] No discernable attribution difference, other than a check-mark graphic that is meaningless to the public, distinguishes the checkoff-funded promotions from NCBA's political messages, which are purportedly not funded by the checkoff—although dollars are notoriously fungible, see J.A. 205.

2. The Beef Act is "not imposed as part of a statute or marketing order that comprehensively regulates the commodity," Pet. for Cert., *United States* v. *United Foods*, No. 00-276 (Aug. 2000), at 13. Instead, the sum and substance of the Beef Act is speech itself. See Pet. App. 11a. Indeed, of more than one billion dollars in checkoff funds spent since the Beef Act's enactment, approximately eighty-five to ninety percent have been spent on generic promotions,[5] and only ten to twelve percent on research, Pet. App. 47a; J.A. 265, and the latter figure encompasses *marketing* research, see 7 U.S.C. 2902(15).

3. The beef promotion program is primarily controlled by representatives of private industry. The Beef Act requires producers to pay one dollar per head of cattle sold to state "beef councils," which may be either private or quasi-governmental in character. 7 U.S.C. 2904(8)(C); *id.* § 2904(1).[6] The councils in turn must remit fifty cents of each

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[4] See *NCBA Policy Division Says Bush Is The One*, available at http://www.beef.org/dsp/dsp_content.cfm?locationId =45&contentTypeId=2&contentId=2746 (Aug. 18, 2004); see also *Amicus* Br. of Campaign for Family Farms 11-12.

[5] "Promotion" encompasses "any action, including paid advertising, to advance the image and desirability of beef and beef products" to promote sales. 7 U.S.C. 2902(13).

[6] Importers of beef pay an assessment equivalent to this in value. 7 U.S.C. 2904(8)(C). The Beef Act extended an earlier statute that had authorized a voluntary beef promotion program. See

dollar to the Cattlemen's Beef Board,[7] an organization made up of 111 individual domestic cattle producers and importers of foreign beef, which directs the promotion program. *Id.* § 2904(1). The councils typically send up to half of the fifty-cent balance directly to NCBA, a wholly private trade association that also enjoys a virtual monopoly on the Beef Board's contracts for implementation of the activities authorized by the Act. J.A. 207-08, 236. The Beef Act does not permit the United States Government to fund any of the activities the Act authorizes. 7 U.S.C. 2911. Accordingly, the program is not subject to annual congressional review pursuant to the normal appropriations process.

Beef Board members, who are beef industry volunteers nominated by private industry organizations from various states and approved in slate fashion by the Secretary of Agriculture, 7 U.S.C. 2904(1); J.A. 108-09, are not government officials or employees. The Board's messages are selected and developed by a twenty-member Beef Promotion Operating Committee, 7 U.S.C. 2904(4)(B), (C); J.A. 96-98, 189-90, 236-39. Ten members are independently elected by the beef industry through the NCBA, and the Secretary has no discretion over their appointment; she must simply certify that they are directors of a state's beef council as the Act requires. 7 U.S.C. 2904(4)(A); J.A. 302-03. The other ten members come from the Beef Board and are thus functionally picked by the industry as well. 7 U.S.C. 2904(4)(A).

Pursuant to the Act, the Department of Agriculture (USDA) ratifies producer-selected expenditures of checkoff funds. 7 U.S.C. 2904(6)(B). USDA has no power to compose or select the messages on which checkoff dollars are

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Beef Research and Information Act, Pub. L. No. 94-294, 90 Stat. 529 (May 28, 1976). This earlier program's initiation was subject to a referendum that twice failed, as petitioners explain, see Nebraska Cattlemen Br. 9-10, and therefore never went into effect.

[7] 7 U.S.C. 2904(8)(C). The Board collects the assessment directly in the five states with no state beef council. *Id.* § 2904(8)(B).

spent. Instead, private beef industry contractors submit promotion proposals to the Operating Committee, which then selects among them. *Id.* §§ 2904(6)(a), 2904(4)(B). The Secretary's role is simply to provide or withhold her "approval," upon which the projects selected by the Committee "become effective." *Id.* § 2904(6)(B). In practice, such approval is *pro forma*, provided the project does not fall outside the broad parameters of the Act; reflecting this *pro forma* role, implementation of projects sometimes begins even before such approval. J.A. 106, 299. The Annual Beef Industry Planning Cycle jointly developed by the Beef Board and NCBA accordingly provides no role for USDA. J.A. 107.

The Beef Board's own materials highlight this lack of governmental control, explaining that "[a] checkoff is directed by its funders and managed by a professional staff. Funders are responsible for allocating funds and approving business plans and programs." J.A. 101. "No decision of the Beef Board is implemented without first being approved by cattle producers." J.A. 248; see *id.* at 81-94, 136.[8]

II. Procedural History

The Beef Act contains a provision for the program's termination by a majority of cattle producers voting in a referendum; the Secretary must schedule such a referendum if more than ten percent of producers subject to the checkoff sign a petition requesting one. 7 U.S.C. 2906. Frustrations with the Act reached a boiling point in 1998, as producers found them-

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[8] The Beef Act itself has not helped domestic cattle producers. Since its enactment, consumption of domestic beef has dropped significantly and domestic cattle prices have fallen, while foreign beef imports have nearly doubled. J.A. 55-56, 194-95, 202, 213-14, 221-23, 289-91. The share of consumer dollars spent on beef that accrues to cattle producers has also fallen almost by half. J.A. 213-14, 223. The main beneficiaries of the Beef Act (in addition to importers) have thus been packers, processors, retailers, and foreign producers—none of whom contribute to the checkoff. J.A. 60, 63.

selves paying the checkoff on cattle sold at prices that failed to cover even the costs of production. J.A. 56. With the assistance of respondent LMA, these producers collected more than 145,000 petition signatures (more than ten percent of producers) supporting a referendum, notwithstanding that the Beef Board had used checkoff funds to pay for "producer communications"—*viz.*, political messages opposing the referendum. For fourteen months after receiving these petitions, the Secretary failed to schedule a referendum. Pet. App. 33a.

On December 29, 2000, respondents brought this action as a challenge both to the Secretary's inaction and to the aggressive "producer communications" campaign. On February 23, 2001, following a hearing, the district court granted a preliminary injunction against these producer communications, holding that the Act and its implementing regulations do not authorize this use of checkoff funds, that some of the communications ran afoul of the Act's prohibition on lobbying, and that the use of objectors' funds for this purpose violated their First Amendment rights. See *Livestock Marketing Ass'n* v. *USDA*, 132 F. Supp. 2d 817, 829-32 (D.S.D. 2001) (*LMA I*) (citing 7 U.S.C. 2904(4)(B); *id.* § 2904(10); 7 C.F.R. 1260.167). The parties initiated discovery in preparation for trial on the remaining referendum issues. After this Court's decision in *United States* v. *United Foods*, 533 U.S. 405 (2001), striking down the materially identical mushroom promotion program, respondents amended their complaint to include broader First Amendment claims. Trial of those claims took place on January 14-15, 2002, and on June 21, the district court rejected petitioners' claim that the beef checkoff constituted "government speech" and held the Beef Act unconstitutional pursuant to *United Foods*, Pet. App. 56a-60a.

The Eighth Circuit affirmed. First, the court of appeals independently reviewed the record and upheld the district court's findings on all crucial facts. Pet. App. 11a. It agreed that the Beef Act is indistinguishable from the mushroom program at issue in *United Foods*, and that its principal object is speech itself. *Ibid.* The court then rejected petitioners'

government speech argument on the ground that respondents were not challenging the government's control of the content of its own speech, but instead "assert[ed] their free speech and free association rights to protect themselves from being compelled to pay for that speech, with which they disagree." *Id.* 17a-19a. The court both refused to label the Beef Act promotions "government speech" and held in the alternative that "a determination that the expression at issue is government speech does not preclude First Amendment scrutiny in the compelled speech context." *Id.* 23a n.9 (citing *Wooley* v. *Maynard*, 430 U.S. 705, 715-17 (1977)).

SUMMARY OF THE ARGUMENT

In *United States* v. *United Foods*, 533 U.S. 405 (2001), this Court invalidated on First Amendment grounds a generic mushroom promotion program in all relevant respects identical to the program at issue here. That holding controls this case. The assessments mandated by the Beef Act cannot survive the demanding First Amendment scrutiny that this Court has applied to laws compelling private persons to finance speech. The beef promotions are not germane to—that is, are not essential to the functioning of—any vital non-speech function of the Beef Act program. As with the mushroom program, speech itself is the Beef Act's primary purpose.

Petitioners do not, in fact, make a serious effort to distinguish *United Foods* based on differences between the mushroom and beef programs. Instead, they ask this Court in effect to *overrule* that case—by holding either (a) that its entire First Amendment analysis was simply irrelevant, because commodity promotion programs are immune from First Amendment scrutiny as "government speech"; or (b) that the Court applied the wrong constitutional standard in *United Foods*, and should instead have applied intermediate scrutiny pursuant to *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), which, petitioners contend, would have led to the opposite conclusion.

Petitioners' government speech argument boils down to one central proposition: that, if the government controls the content of speech, then everything related to that speech, including a requirement that an identifiable group of private persons fund it and associate themselves with it, is immune from First Amendment scrutiny. Even setting aside petitioners' dubious *factual* premise that the government's control over Beef Act speech is more than merely *pro forma*—a premise that would require this Court to overturn the factual findings of both lower courts—their central *legal* premise is untenable. Most glaringly, the rule petitioners propose cannot distinguish circumstances in which the government *speaks* from circumstances in which the government so comprehensively *censors, directs, or compels private speech* that any "control" test is easily met. Ordinarily, increased government control of speech triggers *more* demanding First Amendment scrutiny, not less. Thus, although government control may be necessary for the application of a "government speech" defense, it is surely not sufficient.

At its core, petitioners' argument misapprehends the nature and purpose of the "government speech" label. The government must speak on its own behalf in order to function. Respondents do not challenge the government's ability to speak as it chooses; rather, they challenge its ability to compel beef producers, on pain of sacrificing their chosen livelihood, to fund and otherwise associate themselves with speech the content of which they do not in fact endorse, and some of which they find altogether unacceptable. Permissible government control over the content of speech does not permit the use of coercion to force private persons to support its composition and dissemination. Indeed, in a long line of cases, including *Wooley* v. *Maynard*, 430 U.S. 705 (1971), and *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943), this Court has made clear that the government may not conscript private citizens to disseminate a message that the government itself creates and properly controls.

This Court has also repeatedly recognized that the First Amendment's ban on such conscription forbids the government from requiring private persons to *finance* speech—in cases involving, for example, union agency fees (*Abood* v. *State Board of Education*, 431 U.S. 209 (1977), *Lehnert* v. *Ferris Faculty Association*, 500 U.S. 507 (1991)), state bar association dues (*Keller* v. *State Bar of California*, 496 U.S. 1 (1990)), student activities fees (*Board of Regents* v. *Southworth*, 529 U.S. 217 (2000)), and commodity promotion checkoffs (*United Foods*). Moreover, this Court's expressive association cases (*e.g.*, *Abood*, *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000)) make clear that no one may be compelled to associate with an expressive organization—whether by joining it or by funding its expressive activities.

As *Keller*, especially, makes plain, the right to be free of such coerced financial support and expressive association is no less present, and no less significant, when the government shapes the message. Indeed, it may be *more* significant, for perhaps the First Amendment's *core purpose* is to protect the right of private individuals and groups to dissociate themselves from the government, its views, and its messages. Compulsion to support a government message is the very essence of what the First Amendment forbids. And it is no answer for the government to say that each person within a particular occupational, demographic, or otherwise identifiable group can simply be *assumed* to support a particular message just because the government, guided by conventional wisdom or by a dominant ideology, deems that message to redound to the group's collective benefit. It is not for the government to define each citizen's view of what advances her welfare.

When it has considered a "government speech" defense, this Court has accordingly emphasized two factors quite separate from the degree of government authorship, or control over the content, of speech: the public's likely *attribution* of the speech, and the mechanism by which the speech is *funded*. Consideration of those two factors leads inexorably to the conclusion that the Beef Act is unconstitutional.

This Court could reach that conclusion along either of two paths. First, the Court could follow the approach it employed in *Keller*, in which the Court treated the fact that an organization was associated with and funded by a discrete, occupationally defined group as negating any characterization of the organization's speech as "governmental" even though the state created the organization and closely superintended it. Alternatively, the Court could avoid this labeling exercise and simply hold that, even if the speech is that of the "government," such a characterization bars constitutional challenges only to the government's control of the content of that speech; the government does not thereby acquire authority, free of the usual First Amendment constraints, to compel beef producers to fund and thereby associate themselves with speech to which they object. Under either approach, the Beef Act falls for the same reasons: the generic beef promotions are likely to be attributed by the public to the beef producers rather than to the government; and the checkoff requirement violates objectors' First Amendment rights to be free from compelled funding of speech and compelled expressive association.

These two related constitutional shortcomings are of special significance for a critical reason underlying this Court's approach in cases addressing government speech: that the most appropriate safeguard against government's abuse of its power to speak for itself is political. In a democracy, if it is sufficiently apparent that the government is speaking on its own behalf, we, the people, will be on guard against government's abuse of its power over the bully pulpit and against allocation of taxpayer dollars to fund speech the people do not wish to support. The requirements of transparency and fiscal accountability thus limit the ability of the government wolf to appear in sheep's clothing, propagating its own views in the guise of the views of private persons. They also limit government's ability to deploy the tools of propaganda beyond taxpayers' willingness to foot the bill.

These political safeguards are obliterated if the government's messages are presented as those of private entities, and

are deeply undermined if the costs of the government's loudspeaker are taken "off budget" by funding decisions that shift those costs to a subset of the population. Moreover, coerced funding puts members of that subset, if defined by their occupation, to a choice that is anathema to the First Amendment's freedoms of speech and expressive association: either forgo their livelihoods, or submit to forced linkage with the rest of the group in paying for, and being publicly labeled as the sponsors of, the expression of a message to which they object.

None of these consequences follows if the taxpaying public as a whole funds the speech at issue through general public revenues. For, as this Court has repeatedly recognized everywhere but in the Establishment Clause context, the link between taxpayers and the programs their money might support (including programs involving expression) is far too diffuse to create a constitutionally cognizable compelled association. Taxpayers are not, by virtue of their tax payments, involuntarily associated with any particular governmental message — even if some portion of an otherwise general form of tax is "earmarked" for the support of such a message.

Indeed, even some narrowly targeted special assessments might, when used to fund government speech, escape (or at least withstand) constitutional scrutiny. Fees for the privilege of attending universities or using various government facilities or programs, for instance, are not *compelled*, but are simply the price of voluntary use of a public service, nor do they in any event associate the payer with any message expressed by the payee. Likewise, taxes assessed on each sale of a particular product, used to fund government health and safety campaigns advertising the product's dangers or criticizing its producers, are not jeopardized by the analysis proposed here—in part because the public would never attribute the government's warnings to those who pay the taxes, whether producers or users. Petitioners' overheated arguments about the numerous government programs respondents' position would endanger are, in short, nothing but straw men.

Finally, as an alternative to its "government speech" defense, the government contends that the beef promotion program survives First Amendment review under the standard set by *Central Hudson*. This Court squarely rejected that contention in *United Foods*, holding that, even if it accepted the dubious premise that *Central Hudson* sets forth the applicable standard, the mushroom promotion program could not come close to satisfying it. The purported government interests asserted by petitioners here, such as the supposed "free rider" problem, are merely *ex post* rationalizations; there is no evidence that they actually motivated Congress, and they have no basis in fact. Furthermore, the Beef Act's funding mechanism is not narrowly tailored; obvious, less burdensome alternatives include financing the program through general tax revenue or voluntary contributions.

More fundamentally, petitioners' attempt to invoke *Central Hudson* seeks to fit a square peg into a round hole. *Central Hudson*'s rationale has no logical application in compelled speech cases, which involve none of the unique features of the buyer-seller relationship that might justify subjecting *regulation* of commercial speech to less than strict scrutiny. In such cases, *Abood* sets the governing standard.

ARGUMENT

I. The Beef Act Violates Respondents' First Amendment Rights Of Speech And Association, And The Very Facts That Establish The Constitutional Infirmity Preclude This Court From Sustaining The Act On "Government Speech" Grounds.

As this Court's decision in *United States* v. *United Foods* makes clear, the generic beef promotion program authorized by the Beef Act abridges respondents' First Amendment rights against compelled speech and compelled expressive association. Two features of the Beef Act are fatal: first, the promotions are expressly attributed to producers, ensuring that they will be involuntarily associated by the public with

messages to which they object; and second, the checkoff requirement conscripts producers to support these messages as the price of pursuing their livelihood. These very same features of the Act *also* demonstrate the futility of petitioners' principal attempt to evade this Court's clear holding in *United Foods*—namely, their "government speech" argument.

That argument consists of two related propositions: that speech under the Beef Act is properly characterized as "governmental" simply because the government allegedly controls its content; and that such characterization of speech as "governmental" suffices to remove everything related to that speech (*e.g.*, its funding and attribution, as well as its content) from First Amendment scrutiny. Taken together, these two propositions constitute an assertion of government power over private speech that is breathtaking in scope. It amounts to the claim that, so long as the government asserts *enough* control over speech, *no* First Amendment scrutiny whatsoever applies. None of this Court's decisions related to government speech—indeed, no decision of *any* kind of *any* court of which respondents are aware—supports this topsy-turvy view of the First Amendment.

In rejecting petitioners' view, this Court could validly take either of two approaches. First, it could decline to label the Beef Act promotions as "government speech"—recognizing that, even accepting *arguendo* that the government controls their content (an assertion the lower courts properly rejected), this control is insufficient to merit characterizing the speech as governmental. An advantage of this approach is that this Court followed it in *Keller* v. *State Bar of California*, 496 U.S. 1 (1990)—the closest precedent by far, and one that petitioners all but ignore. In *Keller*, the Court acknowledged that the speaking entity was clearly "governmental" under state law, but refused to label the entity's speech "government" because it represented not the general public but an identifiable group of individuals who were compelled by virtue of their occupation to make payments to it. *Id.* at 10-11.

Alternatively, the Court could eschew these semantic distinctions and simply recognize the core principle that underlies *Keller* as well as many of its other compelled speech and compelled association rulings: that the government may not compel selected groups of private individuals to fund and to associate themselves with speech *even if that speech is the government's own*, unless the constitutional tests to which this Court has previously subjected such compulsion are satisfied. On this view, the classification of speech as "governmental" or "private" is not dispositive. Although the government's control over the *content* of its own speech is not limited by the First Amendment, its character as "government speech" does not similarly insulate from review *other aspects* of an expressive program, such as how it is funded and how the messages are attributed. The principal advantage of this approach is its logical clarity; by using it, this Court could sweep away some of the confusion that has surrounded the still-nascent idea of a "government speech doctrine."

Either approach, however, equally demonstrates that no "government speech defense" can shield the Beef Act from First Amendment scrutiny. And, once that scrutiny is applied, the Act is unconstitutional, as *United Foods* makes plain.

A. This Case Is Indistinguishable From *United Foods*, Demonstrating That The Beef Act Falls Under This Court's Compelled Speech And Compelled Association Precedents.

In *United States* v. *United Foods*, 533 U.S. 405 (2001), this Court held that the generic mushroom promotion program, a checkoff program that is in all relevant respects identical to the Beef Act program, failed the First Amendment test that this Court has long applied to government programs that compel private persons to finance speech with which they disagree. See, *e.g.*, *Abood* v. *State Board of Education*, 431 U.S. 209 (1976). The government makes no serious attempt to argue that the beef program satisfies the *Abood* test, nor, indeed, to distinguish *United Foods* in terms of differences

between the programs at issue.[9] Some of its *amici* do, but their arguments misunderstand the *Abood* test.

Abood was one of a line of cases addressing "agency shop" arrangements that require employees in a unionized workplace, even if they refuse to join the union, to submit fees reimbursing the union for its activities on their behalf as collective bargaining representative. This Court has held that to the extent such fees are used to finance *expressive* activities, they burden objecting employees' First Amendment rights by forcing them to affiliate themselves with an expressive association and fund speech with which they disagree. Unions' use of agency fees to fund expression thus must, as this Court held in *Lehnert* v. *Ferris Faculty Association*:

> (1) be "germane" to collective-bargaining activity;
>
> (2) be justified by the government's vital policy interest in labor peace and avoiding "free riders"; and
>
> (3) not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop.

500 U.S. 507, 519 (1991) (clarifying the *Abood* test).

United Foods made clear that this analysis applies to commodity promotion programs. 533 U.S. at 514-15. This Court did not need to reach the second and third portions of the test in *United Foods*, but instead held simply that the mushroom promotion program did not even satisfy the "germaneness" requirement. That requirement is far more rigorous than petitioners' *amici* acknowledge: to qualify as "germane," it is insufficient for speech to be *relevant* to a valid non-speech program—nor does it suffice for the speech sim-

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[9] Nebraska Cattlemen all but argue that *Abood* and its progeny should be overruled, asserting that compulsion to fund speech is not compelled speech. Nebraska Cattlemen Br. 37 (quoting *Lathrop* v. *Donohue*, 367 U.S. 820, 858 (1961) (Harlan, J., concurring in the judgment)); *id.* at 37-39. This argument conflicts with decades of this Court's case law and merits no serious consideration.

ply to serve that program's overall purpose. See, *e.g.*, *Amicus* Br. of American Cotton Shippers Ass'n 3 (arguing that promotions help the Cotton Board to "communicate and capitalize on" research breakthroughs). Rather, the speech must be *necessary to the functioning* of the non-speech program; it must be an inextricable part of the performance of its non-speech function. Hence, the *Lehnert* Court held that non-members could not be compelled to fund union lobbying efforts intended to increase funding of the teaching profession generally, as that speech was *not* "germane" to the collective bargaining function of a teachers' union: *e.g.*, speaking to management at the bargaining table, or lobbying the legislature to approve a bargaining agreement. 500 U.S. at 527.

The difference in outcome between *United Foods* and *Glickman* v. *Wileman Bros. & Elliott*, 521 U.S. 457 (1997), further illustrates this distinction. In *Wileman Bros.*, this Court upheld a California tree fruit promotion program on the basis that the promotions were part and parcel of a unique program of economic regulation governing an already collectivized industry. Compelled collective speech is sometimes essential to effectuate an existing cooperative endeavor—like collective bargaining or the cooperative marketing and sale of tree fruit. Such speech satisfies the germaneness test.

Because the mushroom market (like the beef market) is fully competitive and individualized, the Court in *United Foods* concluded that the mushroom promotions were not necessary to achieve an important, non-speech regulatory purpose. The Court explained:

> The statutory mechanism as it relates to handlers of mushrooms is concededly different from the scheme in *Glickman*; here the statute does not require group action, save to generate the very speech to which some handlers object. In contrast to the program upheld in *Glickman*, * * * there is no broader regulatory system in place here. We have not upheld compelled subsidies for speech in the context of a program where the principal object is

> speech itself * * *. Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance.

533 U.S. at 415.

There is no material difference between the programs at issue here and in *United Foods*. Like the mushroom industry, the beef industry is highly competitive, decentralized, and economically unregulated. As the district court found,

> Clearly, the principal object of the beef checkoff program is the commercial speech itself. Beef producers and sellers are not in any way regulated to the extent that the California tree fruit industry is regulated. Beef producers and sellers make all marketing decisions; beef is not marketed pursuant to some statutory scheme requiring an anti-trust exemption. The assessments are not germane to a larger regulatory purpose.

207 F. Supp. 2d at 1002. The court of appeals affirmed this finding, see Pet. App. 11a, and this Court should not second-guess it. See *National Collegiate Athletic Ass'n* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984) ("In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals.").[10] The promotions fail the germaneness test.

Moreover, the Beef Act cannot satisfy either of *Abood*'s *other* two requirements, as framed in *Lehnert*: that compelled

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[10] Petitioners repeatedly ask this Court to ignore its longstanding two-court rule, alleging that various factual findings of the district court (all of which were affirmed by the court of appeals) are not "supported by the record." See, *e.g.*, Nebraska Cattlemen Br. 33. Their assertions are wrong, but more fundamentally, they ask this Court to engage in a task to which the courts of appeals are far better suited: close scrutiny of the trial record. The court of appeals engaged in just such scrutiny here and found the district court's conclusions well supported.

financing of the speech be justified by "a vital policy interest" *and* that it "not significantly add to the burdening of free speech that is inherent in" the nonspeech program to which the speech is germane. 500 U.S. at 519. These requirements are stricter than the parallel "substantial interest" and "narrow tailoring" requirements applied in some of this Court's commercial speech precedents—and, in Section III.B below, we demonstrate that the Beef Act violates even those less stringent requirements. *A fortiori*, the Beef Act cannot survive *Abood*'s compelled speech and compelled association analysis.

B. The Program's Attribution Of The Speech Funded By Respondents To Beef Producers Rather Than The Government Amounts To Unconstitutional Compelled Speech And Association, And Defeats Any "Government Speech" Defense.

1. An essential principle reflected in this Court's compelled speech and expressive association cases is that persons have a right not to be associated involuntarily with speech that they do not wish to support. Whether one is involuntarily associated with a message turns in large part on the likely attribution of that message by its recipients. When the audience is likely to attribute speech to a private person who has been involuntarily conscripted, that private person's First Amendment rights are abridged—and the "government speech" label is unavailing, because in no meaningful sense can the government then be described as speaking on its own behalf.

This is such a case. The television and print ads produced by the Beef Board are all expressly attributed to "America's beef producers," and nowhere is this attribution even qualified by the suggestion that the message might be mandated by the government. And, beyond this express attribution, because the promotions advertise a commercial product and are aired or displayed in venues and in formats normally used for commercial advertising, they are far more

likely to be perceived as representing the views of commercial beef producers than those of the government. Some of the promotions even involve joint advertising ventures with commercial restaurant chains—not, to say the least, indicative of governmental authorship. See *Amicus* Brief of Public Citizen Part II.B (discussing campaign advertising beef subs by restaurant chain Quizno's).[11] As discussed in Sections II.A and II.C, the Beef Board's own website and other materials affirmatively emphasize the industry's control and funding of the promotions, further dissociating the government from the message in the public mind.

This Court's compelled speech cases rightly emphasize the significance of public attribution. In its student activity fee cases, for example, the Court has emphasized that a school's "adherence to a rule of viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspapers speak for the University.'" *Southworth*, 529 U.S. at 233 (quoting *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841 (1995)). Similarly, in *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994), the Court upheld governmental must-carry provisions imposed on cable operators, reasoning that "there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator." *Id.* at 655. In *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), addressing the question whether the state could require the private organizers of a parade to permit a gay and lesbian group to participate, the Court distinguished *Turner* on the basis that parade displays may easily be per-

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[11] See also, *e.g.*, Beef Board, *Beef Industry To Help Launch Pizza Ranch® Steak Pizzas*, CHECKOFF NEWS, Jan. 26, 2004; Beef Board, *Ground Round Grill & Bar® Teams With Beef Checkoff*, CHECKOFF NEWS, Jan. 28, 2004; http://www.Beefboard.com/dsp/dsp_locationContent.cfm?locationId=1054 (listing similar releases).

ceived as reflecting the opinions of the organizer, even when that perception is false. *Id.* at 576; see also *Pruneyard Shopping Center*, 447 U.S. at 87 (deeming "most important" the fact that the "views expressed by members of the public in passing out pamphlets * * * will not likely be identified with those of the owner" of the shopping mall).

2. In addition to abridging free speech rights, the Beef Act violates the objectors' First Amendment right to expressive association. State interferences with the right *not* to associate for expressive purposes are subject to strict scrutiny. See *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647-48 (2000); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 623 (1984). Here the Beef Board plainly "engages in 'expressive association,'" *Boy Scouts*, 530 U.S. at 649; indeed, its primary *purpose* is expressive. When an expressive organization like the Beef Board attributes its speech publicly to the very producers who are compelled to support that speech financially, those producers' First Amendment rights of expressive association are infringed. This Court's expressive association cases have emphasized public perceptions even when the likelihood that the public will infer that objectors support a message is significantly lower than it is in this case, in which the misleading attribution is plastered across viewers' television screens. See, *e.g.*, *id.* at 653 (considering the message sent to the public by an organization's conspicuously involuntary affiliation with an individual); see also *infra* Section II.C (further developing the expressive association argument as a reason why the Beef Act's funding mechanism is unconstitutional).

3. Public perception is critical to the central rationale underlying this Court's "government speech" cases: that the *political process*, not judicial enforcement of the Constitution, is the most appropriate check on abuses of the government's power to speak. The Court in *Southworth* thus explained:

> When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the

> end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.

Id. at 235. As one commentator further explains, "[w]hen it is *clear that the government is talking*, its discretion to discriminate among the topics and viewpoints that it presents is very broad. This broad discretion * * * [reflects] the democratic ideal of a government responsive to the will of the people who created it." Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 40-41 (2002) (emphasis added).

Political checks on governmental abuses of the power to speak are unlikely to be effective if the speech in question is not readily *perceived* to be the government's. The government's use of private actors to advance what is actually the government's own message is far more insidious from a First Amendment perspective than is the government's practice of openly speaking on its own behalf—a danger that argues for *heightened* First Amendment scrutiny when governmental- and private speech are intertwined, or at least for recognition that, in such situations, the resulting interference with the First Amendment rights of private persons should be fully subject to the limits imposed by this Court's compelled speech cases.

C. The Act's Financing Mechanism Unconstitutionally Compels Speech And Expressive Association, And Precludes Any "Government Speech" Defense.

1. The Beef Act's compelled financing mechanism severely burdens respondents' First Amendment rights by forcing them to provide financial support to speech with which they disagree. As this Court has long recognized, contributing money has well-recognized significance in terms of freedom of expression and association. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 124 S. Ct. 619, 711 (2003) (Rehnquist,

C.J., for the Court) ("Limitations on the amount that an individual may contribute to a candidate or political committee impinge on the protected freedoms of expression and association."); *id.*, 124 S. Ct. at 723 (Scalia, J., dissenting) (citing cases for the proposition that "an attack upon the funding of speech is an attack upon speech itself"); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (observing that, even though money merely "enables speech," it cannot be gainsaid that "[b]oth political association and political communication are at stake" in regulation of campaign contributions). The rights of individuals to fund speech that expresses their views and *not* to fund speech that does not do so are two sides of exactly the same First Amendment coin. Requiring beef producers to pay for the generic promotions as the price of continuing to practice their livelihoods therefore puts objecting producers to a choice—"Either abandon your chosen occupation, or pay for speech with which you disagree"—that is anathema to the First Amendment.

Compelled funding also directly abridges respondents' freedom of expressive association. In *Abood*, for example, the right of employees to refuse to associate with a union, absent an expressive component in the association, was deemed entitled to little constitutional protection and was trumped by the strong interest in making collective bargaining possible by preventing unions from being undermined by the prevalence of free-riders. But because the unions' *expressive* activities implicated nonmembers' rights "to associate for the purpose of advancing beliefs and ideas," *much* more stringent scrutiny applied: payments could be compelled only for those activities demonstrably "germane to [the union's] duties as collective-bargaining representative." 431 U.S. at 233, 235.

Notably, *Abood* held that the right of expressive association was at stake even though objecting employees were not compelled to *join* the union—just to support it financially though the payment of agency fees. For purposes of compelled speech and expressive association analysis, the agency shop arrangement was constitutionally equivalent to the union

shop arrangements at issue in *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956), and *International Association of Machinists* v. *Street*, 367 U.S. 740 (1961), in which membership had been compelled. See *Abood*, 431 U.S. at 219 n.10 ("[This case, like *Hanson*, is] concerned simply with the requirement of financial support for the union, [not] the additional requirement * * * that each employee formally join the union * * *."); see also *Lehnert*, 500 U.S. at 514-15. *Abood* and its progeny thus reflect the principle that the right to refuse to join an organization does not sufficiently protect a person's freedom of expressive association if that person is nonetheless forced to help pay for the organization's expressive activities. This holds especially true when the organization is one that—as with a union or industry association—claims to *represent* those who are forced to pay, for such cases present a special risk that the organization's speech will be attributed by the public to those whom the organization purportedly represents.

When the government funds its own speech through general tax revenues, no such constitutionally problematic compelled speech or compelled expressive association results. An expressive program that is funded from such tax revenues does not thereby become associated with any particular group of people; the source of the taxes is far too diffuse. But an expressive program paid for by a narrower group is much more likely to be perceived as associated with the members of that group. Cf. *Frothingham* v. *Mellon*, 262 U.S. 447, 486-87 (1923) ("The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate * * * But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury * * * is shared with millions of others; is comparatively minute and indeterminable * * *."). Petitioners' hyperbolic assertions that respondents' position would incapacitate the government are thus plainly without foundation.

2. The way expressive activities are funded has accordingly played a central role in the Court's "government

speech" jurisprudence. For example, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), when the Court addressed the permissibility of certain restrictions on what family planning clinics could say without losing their federal funding, only the fact of government funding sufficed to remove First Amendment protection from what would otherwise have been protected, private speech: doctors' advice to their patients.[12] Conversely, in *Keller* v. *State Bar of California*, 496 U.S. 1, 11 (1990), the fact that the California State Bar Association was funded not by general tax revenues but by fees that only lawyers were required to pay was critical to this Court's determination that the Association was not a governmental entity for the purpose of the government speech doctrine. 496 U.S. at 11. See also *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545 (1983) (upholding restriction on lobbying by § 501(c)(3) organizations as a simple refusal to "pay for the lobbying out of public moneys" when those organizations were free to create separate, privately funded § 501(c)(4) lobbying arms).

Cases such as *Rust* and *Taxation with Representation* involve claims of impermissible restriction on the speech at issue, while *Keller* involved a challenge to compelled financing of speech. In both contexts, public funding has been a necessary criterion for the success of a government speech defense. When the speech is funded by the government through gen-

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[12] Indeed, the Court emphasized that the First Amendment *does* protect the doctors' right to advise their patients, even if they participate in the program, so long as they do not use government funds to do so. The Court in *Rust* never actually used the language of "government speech"; its holding turned on the fact that the doctors' speech was neither compelled nor substantially limited by the voluntary and relatively non-restrictive subsidy program. The fact that later cases have treated *Rust* as the seminal "government speech" doctrine case simply demonstrates that the core concern of that doctrine is with letting the government use *its own funds* to support whatever messages it chooses to disseminate. See, *e.g.*, *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001).

eral tax revenues, content restrictions have sometimes, but not always, been upheld.[13] But this Court has *never* recognized a government speech defense when the speech in question was *not* funded by taxpayers. In *Keller*, the case that most directly presented the question, the Court relied heavily on the funding factor in concluding that the bar association's speech was not governmental. The Court reasoned:

> The State Bar of California is a good deal different from most other entities that would be regarded in common parlance as "governmental agencies." *Its principal funding comes not from appropriations made to it by the legislature, but from dues levied on its members by the Board of Governors.* Only lawyers admitted to practice in the State of California are members of the State Bar, and all 122,000 lawyers admitted to practice in the State must be members.

496 U.S. at 11 (footnote omitted) (emphasis added). This case is indistinguishable: The beef promotion program is funded not from Congressional appropriations, but by mandatory payments that all members of the beef industry must make to their respective state beef industry associations.[14]

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[13] Subsidies from the public fisc do not, of course, *invariably* suffice to insulate control over the content of subsidized speech from First Amendment scrutiny. Rather, they are necessary but not sufficient for a government speech defense to succeed. When such subsidies are not given for the express purpose of promoting a particular government message, but simply to create a forum for private speech or to fund speech on behalf of some private person (like a lawyer's client), this Court has refused to recognize a government speech defense. See *Velazquez*, 531 U.S. at 541; *Rosenberger*, 515 U.S. at 833-34.

[14] *Keller* is, indeed, devastating to petitioners' argument. Petitioners bizarrely contend that *Keller* supports them because the Court considered whether the bar's speech was governmental before applying compelled speech analysis—supporting, they claim, the notion that compelled financial support from a narrow group of

Similarly, in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000), in which a student activities funding policy was challenged by students who objected to paying the mandatory fee rather than (as in *Rosenberger*, 515 U.S. 819) by student groups excluded from its payouts, this Court refused to apply the government speech doctrine. As petitioners observe, the Court relied in part on the university's lack of control over the content of student speech; but, the Court *also* relied on the fact that payments came not from taxes or tuition[15] but from compelled student activity fees. 529 U.S. at 229 ("If the challenged speech here were *financed by tuition dollars* and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." (emphasis added)); see also *id.* at 222-23, 234 (emphasizing that the fee was "segregated" from tuition charges). As *Southworth* shows, even the distinction between student activity fees and tuition—a far subtler distinction between funding mechanisms than the major difference at issue in this case—can decide the applicability of a government speech defense.

3. Financing by a narrow group also increases the likelihood that others will perceive the speech as private rather than governmental. See *United States* v. *Frame*, 885 F.2d 1119, 1132 (CA3 1989) (describing the Beef Act's "funding scheme, with its close nexus between the individual and the

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private persons would be permissible if the speech *were* governmental. See U.S. Br. 26; Nebraska Cattlemen Br. 30. That reading, of course, ignores *Keller's* holding that speech *cannot be deemed governmental* in the first place, notwithstanding governmental control of the entity speaking, if it is funded through compelled financial support by a narrow group of private persons. Thus, petitioners read *Keller* to stand for a proposition that is essentially the opposite of its actual holding.

[15] Tuition is a form of user fee assessed as the price of voluntary use of a government service, and as such (like general taxation) does not raise a compelled speech problem. See *infra* Part II.D.

message funded"); see also *Southworth*, 529 U.S. at 240 (Souter, J., concurring in the judgment) (distinguishing agency fees on the basis that, in the case of student activity fees, the "relationship between the fee payer and the ultimately objectionable expression is far more attenuated" than when union members are "required to join or at least drop money in the coffers of the very organization promoting messages subject to objection," thereby creating a "clear connection between fee payer and offensive speech"); Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2423 (2004) (arguing that in *Keller*, the "fees were the nexus that associated the speech at issue with the protesting parties").

4. Here, however, because the public does not foot the bill, the Beef Act's narrow funding mechanism shuts down the crucial political safeguard provided by taxpayers' scrutiny of the government's use of their money. See *Southworth*, 529 U.S. at 229 (referring to "traditional political controls to ensure responsible government action"); *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.").

Indeed, one of the government's arguments *in favor* of the checkoff requirement dramatically, if inadvertently, proves this point: The government contends that, if the beef promotion program were funded by tax revenues, a public backlash would be likely. U.S. Br. at 41.[16] And the Beef

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[16] The Beef Act's referendum mechanism does not provide an analogous political safeguard. Contra, *e.g.*, Nebraska Cattlemen Br. 39 n.8. First, it is ineffectual. In this case, the Beef Board fought respondents' push for a referendum using checkoff funds, and when the petition drive was nonetheless successful, the Secretary failed to organize a referendum anyway. In 2000, a majority of

Board's own web site (a dot-*com*, not a dot-*gov*) trumpets the fact that the Board receives "no government funds," presumably to reassure taxpayers that their money is not being wasted. On the Board's Frequently Asked Questions page, one finds this revealing colloquy:

> Who pays for the checkoff?
>
> Each checkoff program is supported entirely by its respective industry, which could include U.S. producers, processors, handlers and importers. NO TAXPAYER OR GOVERNMENT FUNDS ARE INVOLVED.").
>
> * * *
>
> Do checkoff programs receive government assistance?
>
> No. Checkoffs are funded entirely by their respective industries, NOT by taxpayers or government agencies.

See http://www.beefboard.com/dsp/dsp_locationContent.cfm?locationId=1062 (last visited Sept. 24, 2004) (capitals in original).

When the political checks on government decisions to disseminate messages are absent, no "government speech" defense is justifiable; to the contrary, government speech

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pork producers voted in a referendum to eliminate the pork promotion program, but in 2001 the new administration disregarded the result of the referendum and simply continued the program.

More fundamentally, accountability to a particular industry group is not the kind of democratic accountability that this Court's government speech cases contemplate. In a democracy, the government should speak for the majority of its citizens. It is a distortion of democracy for the government to speak for just a majority within a particular special interest group—or, as here, for a particularly influential minority even within that group. (Although the government may often serve special interests, it is ultimately accountable to the public when it spends the public's money in doing so.) And only the public as a whole provides the ultimate check on abuse of government authority—voting the public's representatives out of office.

structured to evade political accountability poses distinct dangers that, in a democracy, should invite not more *relaxed* but *closer* judicial scrutiny. Cf. *FCC* v. *League of Women Voters*, 468 U.S. 364, 416 (1984) (Stevens, J., dissenting) ("[T]he interest in keeping the Federal Government out of the propaganda arena is of overriding importance. * * * Congress enacted many safeguards because the evil to be avoided was so grave. Organs of official propaganda are antithetical to this Nation's heritage, and Congress understandably acted with great caution in this area."); *Barnette*, 319 U.S. at 641 ("Authority here is to be controlled by public opinion, not public opinion by authority.").[17]

II. The Beef Act Cannot Be Saved On The Ground That The Government Supposedly Controls The Content Of The Promotions.

Petitioners' sole argument for exempting the Beef Act from First Amendment scrutiny as merely a vehicle for "government speech" is the degree of governmental control over the beef ads' content. See, *e.g.*, U.S. Br. 20 ("A program involves government speech when the government controls the content of the speech that is disseminated under it."); Nebraska Cattlemen Br. 28. Petitioners argue that Congress au-

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[17] In another example of its surreal logic, the government contends that the very fact that producers are compelled to contribute "reinforces the conclusion that Beef Act speech is government speech" because Congress has "assumed responsibility for ensuring that it is funded." U.S. Br. 33. Again, the argument runs, the more the government imposes on private citizens' First Amendment rights, the *less* constitutional scrutiny should apply! This argument is utter nonsense. Had Congress funded the program through the U.S. Treasury, that would have been a meaningful assumption of "responsibility," for which Congress would have been politically accountable; imposing the cost on a narrow group of private citizens is nothing more than a *dodge* of responsibility. The Beef Act in fact *forbids* public funding of the program, making it entirely dependent on the funds raised through the checkoff.

thorized the program through passage of the Beef Act and set parameters for the promotions' message; that the Secretary of Agriculture has certain oversight responsibilities; and that the Beef Board, which implements the Act, constitutes a "governmental entity," citing *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374 (1995). For several reasons, these arguments are unavailing.

1. As amply demonstrated in the Statement of the Case, *supra* at 3-5, the factual premise for petitioners' argument is simply wrong: the government's control over the content of Beef Act promotions is merely *pro forma*. Congress specified the message to be promoted only in the loosest sense—essentially, anything is permissible, as long as the industry representatives who control the program decide that it will advance the interests of the industry.[18] That form of "control" of the message—"You're permitted to say only what you want to say"—is not control at all. As for the Beef Board itself, its members are private industry representatives approved in slate fashion by the Secretary; the Operating Committee, the entity directly responsible for selecting the messages, is evenly divided between Beef Board members and members of the National Cattlemen's Beef Association, over whose appointment USDA has no discretion. See *supra* at 4. USDA loosely oversees compliance with the statute's conditions, but it does not initiate, create, devise, compose, fund, or implement any of the Board's activities. *Id.*

The district court accordingly found that USDA's control of the promotions' content is only ministerial, and that the speech is in practice privately controlled, a factual finding affirmed by the court of appeals and certainly entitled to deference here. *National Collegiate Athletic Ass'n.* v. *Board of Regents*, 468 U.S. 85, 98 n.15 (1984). It also observed that

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[18] See 7 U.S.C. 2902(13) (promotions must "advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace").

the Beef Board *represents itself* as being entirely industry-controlled. Pet. App. 55a (Board publications describe it as a "producer-controlled, independent Board" and the beef checkoff as an "industry run program")—belying petitioners' contrary assertions in this Court, and further demonstrating that the beef promotions will certainly be attributed to producers rather than to the government.

Finally, even if the Beef Board *were* a government entity, NCBA—to which up to one-quarter of checkoff funds are sent *directly* by the beef councils that collect them, without passing through the Beef Board's control—indisputably is not. Similarly, some of the state beef councils, which collect all the checkoff funds and retain whatever portion they do not remit to the Beef Board and NCBA, are also wholly private; they are simply trade associations.[19] No "government speech" defense could possibly insulate a compulsion to associate with these private entities and to finance their speech from First Amendment scrutiny.

2. Even if the government did control the content of the beef promotions, that fact would not suffice to trigger a "government speech" defense. It cannot be the case that government control of the content of speech—that is, the fact that the government has effectively compelled and/or effectively regulated the speech—altogether immunizes the compulsion or regulation from constitutional scrutiny. Such a rule—which indeed is the essence of petitioners' argument—would take First Amendment doctrine through the looking glass: The more severe the government's censorship, the less scrutiny courts would afford. The fact that the state *controls* the speaker and the speech thus surely cannot suffice to show that the "State *is* the speaker," *Rosenberger*, 515 U.S. at 833 (em-

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[19] See, *e.g.*, Alabama Cattlemen's Association, *About Us*, http://www.bamabeef.org/about_us1.htm (last visited October 15, 2004). State beef councils take a variety of forms; some are totally unaffiliated with the state government, while others have some degree of affiliation.

phasis added), nor to explain why a requirement that private persons fund the speech should be immune from First Amendment scrutiny.

Indeed, *Keller* demonstrates that extensive governmental control cannot be dispositive. The Supreme Court of California had held in that case that the state bar was "governmental"—citing, among other things, its "status as a public corporation" and noting an "extensive degree of legislative involvement and regulation" exceeding that found in other state bar associations. See 496 U.S. at 7; see also *Keller* v. *State Bar*, 767 P.2d 1020, 1023-25 (Cal. 1989) (explaining that the state bar was created by act of the state legislature; had a statutorily defined purpose; and functioned as an "administrative assistant or adjunct to" the state supreme court).

This Court, reversing that court's judgment that the bar's speech was immune from constitutional scrutiny as "government speech," held that these factors did not control. Instead, the Court cited three factors in support of its refusal to apply the "government speech" label: that the bar association was funded through bar fees rather than general tax revenues; that its membership was limited to lawyers and that it therefore did not represent the public as a whole; and that it had no power to admit lawyers to practice in the state courts. 496 U.S. at 10-12. All three factors likewise point to the conclusion that the Beef Board's promotions are not entitled to the protections of the "government speech" defense: The promotions are funded through a targeted assessment on industry members; the Board is limited to representatives of a specific industry, and therefore is not "expected as a part of the democratic process to represent and to espouse the views of a majority of * * * constituents," *id.* at 12; see Nebraska Cattlemen Br. 35; and the Beef Board's powers over industry practices are even more limited than those of the State Bar—it is forbidden even to *attempt* to influence government policy regarding beef regulation. See 7 U.S.C. 2904(10). The Beef Board is no more "governmental" than is the State Bar of

California; indeed, it is probably less so. *Keller* cannot be meaningfully distinguished.[20]

Keller also shows why *Lebron* is easily distinguishable. *Lebron* addressed the question whether Amtrak could discriminate based on content in leasing billboard space in its stations—*i.e.*, whether Amtrak was a governmental entity for the purpose of *subjecting* its actions *to* the First Amendment, not for the purpose of *insulating* those actions *from* the First Amendment. The Court held that Amtrak was governmental only for the former purpose. 513 U.S. at 386-91. And, despite petitioners' assertions, the definition of "governmental" is not identical for these two purposes. See U.S. Br. 34. Notably, although a state bar association is not governmental in any sense that would allow it to use its members' fees for non-germane expressive activities, see *Keller*, 496 U.S. 1, 11-12 (1990), it *is* governmental in the sense that it must abide by certain constitutional restrictions, including the First

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[20] Petitioners Nebraska Cattlemen argue (at 36) that Congress exercises more control over the message of the beef ads than did the California state legislature in *Keller*. This argument is wrong for several reasons. First, if petitioners were right about what criteria identify an institution as governmental, then the State Bar would itself have been a governmental entity—and so it would have made no *difference* whether the state legislature or the Bar itself controlled its messages. No special status attaches to "governmental" speech that is *legislatively* controlled rather than controlled by some other branch of government. Second, Congress in the Beef Act set forth only very general parameters for the beef promotions' message—not very different from the California State Bar's legislative directive to engage in expression and other activities designed to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." 767 P.2d at 1024. Third, and most importantly, this Court did not emphasize or even mention the State Bar's freedom in shaping its messages as a reason the Bar could not be considered "governmental." It relied only on the above-listed factors, all of which apply equally to the Beef Board. See 496 U.S. at 11, 13.

Amendment. See, *e.g.*, *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 8 (1971) (state bar's requirement that applicants identify their party affiliation violates the First Amendment); cf. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975) (the fact that "[t]he State Bar is a state agency for some limited purposes" does not make it one for *all* purposes).

3. Even if Beef Act promotions were labeled "government speech," the compelled financing mechanism would thus still be subject to First Amendment scrutiny. This Court's seminal compelled speech case, *West Virginia State Bd. of Education* v. *Barnette*, 319 U.S. 624 (1943), involved a message—the Pledge of Allegiance—that was clearly "government speech" in that, although physically spoken by private individuals, it was drafted and adopted by Congress and implemented largely through governmental (teacher) demands that students recite it *en masse*. In *Wooley* v. *Maynard*, 430 U.S. 705 (1977), which struck down a requirement that all New Hampshire license plates display the state's motto, the governmental component of the speech—creating the motto, manufacturing and distributing the plates, and requiring their use—is even more obvious.

As these cases show, the compelled speech doctrine *originated* in response to compelled *private participation* in *government* speech. Only later—in *Abood*, which followed *Wooley* and *Barnette*—was the doctrine extended to compelled support of *private* speech. The standard of scrutiny in this case should thus be *at least* as strict as the standard the Court has applied to compelled support of private speech—that is, the *Abood* germaneness test.

Indeed, there is a strong argument that a law compelling private speakers to support and associate themselves with government speech should be subject to *stricter* constitutional scrutiny than one that compels them to support private speech. No value is more central to First Amendment doctrine—one could fairly describe it as the reason we *have* the First Amendment—than the freedom of private speakers to

dissociate themselves from the government: to criticize its policies through speech or in the press, to petition for a change in those policies, to practice religion free from its interference, and, critically, to disagree with its chosen messages. This Court has held that the First Amendment protects even the right to advocate *violence* against the government, absent incitement of imminent lawlessness. See *Brandenburg* v. *Ohio*, 395 U.S. 444, 448-49 (1969). Surely, then, it also protects against the government's ability to compel private citizens to provide affirmative support for the government's message—whether that support takes the form of speaking a pledge, see *Barnette*, 319 U.S. 624, signing an oath, see *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441, 447-49 (1974), or, as here, contributing money.

This Court has recognized that government control of the message *heightens* constitutional concerns in contexts involving not compulsion literally to speak or write, but rather to provide support for the speech physically uttered by others. In *Pruneyard Shopping Center.* v. *Robins*, 447 U.S. 74, 87 (1980), the Court upheld a state constitutional provision requiring private shopping malls to permit patrons to express their own views. Distinguishing *Wooley*, this Court deemed such compulsion to support private speech permissible in part because "no specific message [was] dictated by the State."

4. Finally, petitioners' notion that government control could completely insulate a program involving speech from First Amendment scrutiny relies on a dichotomy between "governmental" and "private" speech that is too simplistic to be helpful. Many expressive activities convey a government message but nonetheless involve private speakers in a way that plainly implicates those speakers' First Amendment rights. The government thus places inordinate weight on the classification of speech as *either* governmental *or* private, ignoring the reality that much speech is not readily categorized as either. The government's binary approach reflects, to be sure, that taken by many lower courts—but it is not required by this Court's precedent, and it has been justifiably criti-

cized. In a recent opinion respecting the denial of rehearing en banc, Judge Luttig expressed the hope that this Court would one day make clear that certain kinds of speech can be *both* governmental in an important sense *and* sufficiently involved with private speakers' interests to require First Amendment scrutiny. *Sons of Confederate Veterans, Inc.* v. *Comm'r of the Va. DMV*, 305 F.3d 241, 244-47 (CA4 2002) (Luttig, J.). As Judge Luttig noted, the government speech doctrine is in its infancy and has not yet been elaborately articulated; this Court's recognition of the frequent intertwining of government and private speech would not result in any inconsistency with this Court's precedent.

Such a clarification would help make sense of the relationship between the government speech and compelled speech doctrines. To the extent that such "hybrid" speech situations implicate private speakers' First Amendment interests, First Amendment scrutiny should apply—but only to that extent. Here, assuming *arguendo* that the Beef Board and Operating Committee are governmental institutions, the compelled checkoff payments and the attribution of the ads to "America's beef producers" nonetheless interfere with important *private* speech interests: the rights of objectors not to support or be publicly associated with speech with which they disagree. Thus, First Amendment scrutiny would apply to the questions (a) whether and to what extent checkoff payments may be compelled; and (b) whether the ads must publicly associate themselves with the government and dissociate themselves from the objectors. The *governmental* aspects of the speech—most notably, the government's choice of the message—would not be constrained by the First Amendment. This analysis would permit commodity promotion programs to continue to operate, but would not permit the government to compel objectors to support those programs or to attribute the promotions falsely to private producers.

III. Respondents' Approach Does Not "Eviscerate The Government Speech Doctrine."

Contrary to petitioners' hyperbolic assertions, the First Amendment scrutiny that respondents urge would leave intact government's ability to compel support in appropriate ways for the costs of government speech. Even beyond the plainly permissible use of general tax revenues, some targeted mandatory assessments designed to support government speech could almost certainly withstand the applicable level of First Amendment scrutiny, or even escape such scrutiny altogether. We consider here two of the examples petitioners raise: the use of cigarette sales taxes to fund anti-tobacco advertisement, and public universities' charging of tuition.[21] Most of their other examples involve user fees assessed as the price of government services, and are similar to university tuition.

1. Cigarette Sales Taxes

One form of targeted assessment that might validly be used to fund government speech is a tax on sales of dangerous products such as cigarettes, when the revenues are used to fund the government's public health messages about the product's dangers. See *R.J. Reynolds Tobacco Co.* v. *Shewry*, No. 03-16535, 2004 U.S. App. LEXIS 20369 (CA9 Sept. 28, 2004);[22] *Amicus* Br. of Michigan Pork Producers 12-13.

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[21] Invalidating the Beef Act's coerced support of speech would obviously pose no threat to targeted assessments that are used for non-speech purposes, such as the requirement that litigants "pay a filing fee in order to offset some of the court's operating costs." U.S. Br. 30; *id.* at 30-31 (also citing, *e.g.*, parade permits); Nebraska Cattlemen Br. 38-39 & n.7. The government concedes this crucial flaw in its argument. See *id.* at 31 ("The cases discussed above do not involve assessments to support government speech programs.").

[22] In *Shewry*, the court of appeals deemed the California government's use of cigarette tax revenues to fund anti-tobacco ads to be permissible government speech. The court misleadingly suggested that the labeling of speech as "governmental" turns entirely

A principal difference between such taxes and the beef checkoff is that, whereas Beef Act promotions are expressly attributed to producers, few viewers would attribute anti-smoking ads, for example, to *smokers*, the parties upon whom cigarette taxes are normally assessed. And even if such a tax were assessed on the cigarette companies rather than on the smokers, the public still would not attribute the message to the companies, inasmuch as that message is transparently against their interests. See *Shewry*, 2004 U.S. App. LEXIS 20369, at *29 (distinguishing a prior case concerning the Beef Act, on the ground that the anti-tobacco ads "are also clearly identified as coming from the government itself and not from the tobacco companies, the tobacco industry or any other private party or group"). Nor does a cigarette tax force the payers to associate themselves for expressive purposes with an organization, akin to the NCBA or the Beef Board, that purportedly represents them.

In any event, a cigarette tax might well survive First Amendment scrutiny even if the "government speech" defense did not apply.[23] The *Abood* test might be satisfied be-

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on government control of its content. 2004 U.S. App. LEXIS 20369, at *25. But the court nonetheless properly distinguished this case, noting that its rationale—which emphasized that the advertisements in question were unquestionably governmental, and clearly attributable to the government—did not apply to commodity promotion programs in which "the government nominally controls the production of advertisements, but as a practical matter has delegated control over the speech to a particular group that represents only one segment of the population." *Id.* at *27.

[23] Cigarette taxes that fund anti-smoking ads might also survive First Amendment scrutiny because of the magnitude of the government's interest in preventing smoking among children, see *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 564 (2001), or because they closely resemble requirements, already upheld by this Court, that those who disseminate certain types of promotional messages include information that protects the purchasing public from being dangerously misled. See *Zauderer* v. *Office of Disci-*

cause such taxes serve an important function having nothing to do with expression: By increasing prices, taxes discourage people from buying cigarettes. A cigarette tax that is used to fund anti-tobacco ads thus does not suffer from the problem that plagues commodity promotion programs under the *Abood* analysis—namely, that such programs have no non-speech purpose. *United Foods*, 533 U.S. at 415.[24]

2. Tuition and Other User Fees

The government asserts that applying First Amendment scrutiny to compelled support of government speech would threaten such things as state universities' ability to fund their courses by charging students tuition. U.S. Br. 28. Whatever limits, if any, the First Amendment might impose on the expenditure of tuition dollars on expressive university activities—a question left open by this Court, see *Southworth*, 529 U.S. at 229—public universities may undoubtedly use tuition to fund course offerings, and a decision striking down the Beef Act would not jeopardize that ability.[25] Among other

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plinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985); *Meese* v. *Keene*, 481 U.S. 465, 480-82 (1987).

[24] Moreover, even if the government were unable to require cigarette companies to pay for anti-smoking advertisements, such a result would not substantially undermine today's public health activities. Tobacco company payments for anti-tobacco advertising have primarily occurred pursuant to legal settlements in healthcare liability cases—most notably, the 1997 nationwide settlement that established and funded the American Legacy Foundation, which produces major nationwide anti-smoking campaigns. See http://www.americanlegacy.org. No First Amendment theory would preclude such voluntary agreements.

[25] A threshold problem with petitioners' logic is that the expression that takes place in public university courses is generally understood to be the private speech of professors (and of the students who participate in class discussions); as this Court has often recognized, "academic freedom * * * long has been viewed as a special concern of the First Amendment." *Grutter* v. *Bollinger*, 539 U.S. 306, 324 (2003) (citing *Regents of Univ. of Calif.* v.

things, tuition charges involve no constitutionally problematic compulsion: university tuition, like museum entry fees or airport security fees, see *Amicus* Br. of Michigan Pork Producers 11; see also *id.* at 12 (discussing fees paid by drug manufacturers seeking FDA approval of a new drug), is assessed only upon those who voluntarily avail themselves of a government service. Students decide to pay the tuition in order to attend a state university with full knowledge that their money will be used to fund course offerings. A student who does not like a university's menu of course offerings is free not to enroll, just as a museumgoer who does not like the museum's exhibits is free not to visit.[26]

To be sure, respondents also have a choice: they can pay the checkoff, or they can stop raising and selling beef. But even in an era that gives no preferred place to economic lib-

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Bakke, 438 U.S. 265, 312 (1978) (Powell, J.)); see, *e.g.*, *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 249-50 (1957). The ability of state universities to use tuition to fund course offerings therefore cannot be grounded principally in the government speech doctrine; much of the speech that tuition funds is plainly private speech that is itself entitled to First Amendment protection.

[26] This Court distinguished in *Southworth* between tuition and student activity fees, 529 U.S. at 239, a distinction best understood in terms of what the fee is assessed *for* and whether the payer has a corresponding capacity to refuse to pay. While tuition is assessed as the price of attending school, an activity fee is not—it is expressly tacked on *above* that price, and is earmarked for a special program that encompasses expression. A student who disagrees with that expression cannot simply opt out of the program; her only remedy—leaving school altogether—does not correspond to the interference with First Amendment rights, and is so disproportionate as to be an ineffective remedy. This distinction suggests that there *might* be limits on a university's use of tuition dollars. Use of tuition to finance a political campaign, for example, might give rise to a valid First Amendment claim, because that expenditure would be unrelated to the service students thought they were paying for.

erty, this is a choice that the First Amendment forbids the government to impose.[27] Cf. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 824, 833 n.2 (1987). The decision to produce a lawful commodity as one's means of livelihood remains a facet of "liberty" that cannot be equated with voluntary use of a government service. And the decision to *remain* such a producer is even more clearly distinguishable: at the time the beef checkoff was instituted in 1985, many of today's beef producers had pursued that occupation for most of their lives, or kept ranches in their families for generations. Participation in the checkoff program was in no sense what they had bargained for by choosing that occupation.

This Court should therefore resist the characterization of tuition charges as simply "reflect[ing] the common-sense notion that the costs of a university's offerings should be borne by those who benefit from them most directly," a rationale the government urges the Court to extend to the beef checkoff program. U.S. Br. 29. That extension would elide the crucial distinction between those who freely avail themselves of an optional government service and those who are paternalistically forced to "benefit from" an expressive program they do not deem to be in their benefit.

Moreover, a student's payment of tuition would never be perceived as an endorsement of the views of university professors' views, nor museum fees as a visitor's endorsement of the museum's exhibits. Cf. *Heffron* v. *Internat'l Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981). In sharp

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[27] So, for example, state universities may charge in-state residents reduced or no tuition without running afoul of the Privileges and Immunities Clause, *Martinez* v. *Bynum*, 461 U.S. 321, 327-28 (1983), but states may not exclude nonresidents from the bar or from any other "means of a livelihood." *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279 (1985); see also, *e.g.*, *McKune* v. *Lile*, 536 U.S. 24, 40 (2002) (persons other than prisoners may not be forced to choose "between invoking the Fifth Amendment privilege and sustaining their economic livelihood").

contrast, the beef ads are quite certain to be attributed to the beef producers who pay for them.

A final distinction lies in the applicability and application of the *Abood* germaneness test. This Court in *Southworth* held that test uniquely inappropriate to the university setting, and instead imposed a viewpoint neutrality standard. 529 U.S. at 230-31. In other user fee contexts, the *Abood* test would probably be *satisfied* even if the fees were treated as compulsory and subjected to First Amendment scrutiny. For example, the deliberations of an FDA advisory board reviewing a new drug application are plainly germane to FDA's valid non-speech purpose of regulating drug safety; it is impossible for FDA to implement its regulations without those communications, just as it is impossible for labor unions to represent employees effectively if they cannot communicate their ideas to management in the collective bargaining process. See *Amicus* Br. of Michigan Pork Producers 12.[28]

IV. The Beef Act Cannot Withstand Constitutional Scrutiny Under This Court's Commercial Speech Cases.

The government's alternative argument is that, even if the government speech doctrine is inapplicable, the Beef Act survives First Amendment scrutiny under the commercial speech standards of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). But this Court has applied the *Central Hudson* test only in circumstances that implicate the *reasons* for supposing that commercial

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[28] Airport security fees, assessed as the price of voluntary use of a government service and used to fund government-mandated security messages in airports, furnish another example in which the *Abood* test would be easily satisfied. *Amicus* Br. of Michigan Pork Producers 11. The government cannot enforce a regulation barring knives or flammable materials on planes unless it can communicate the existence of those bans to passengers—for example, through signs with lists or pictures of banned items. Posting those signs would clearly be a valid use of a security fee, even if the assessment of the fee did count as compelled speech.

speech regulation (or compulsion) might sometimes merit less-than-strict First Amendment scrutiny, and this is not such a case. Moreover, in *United Foods*, this Court held that it did not need to resolve questions regarding the level of constitutional scrutiny in cases involving commercial speech, "for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case." 533 U.S. at 409. In light of *United Foods*'s square holding that the mushroom program, virtually identical to the beef checkoff, could not withstand even *Central Hudson* scrutiny, petitioners' argument is not substantial.

A. The *Central Hudson* Test Is Inapplicable.

Even accepting *arguendo* the view that the distinction between commercial and noncommercial speech is meaningful in some cases,[29] *Central Hudson* simply has no relevance

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[29] This Court has repeatedly expressed doubt about the *Central Hudson* test, acknowledging that a majority of Justices, albeit in concurring opinions, have now criticized it. See, *e.g.*, *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 367-68 (2002) (citing opinions written or joined by Justices Thomas, Stevens, Kennedy, Ginsburg, and Scalia); *Lorillard*, 533 U.S. at 544; *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 184 (1999); see also Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 630-48 (1990); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 42, 54-55 (2000). As it did in *United Foods*, 533 U.S. at 410, this Court could avoid the issue here because the Beef Act checkoff program is plainly invalid even under *Central Hudson*. The Court may, however, decide finally to lay to rest a distinction that is dubious in principle and has proven problematic in practice. To do so would not contravene the principle of stare decisis: the above-cited cases demonstrate that *Central Hudson*'s value as precedent is plainly already in doubt, and the case has provided little guidance on which litigants and lower courts may reasonably rely, given the arbitrariness of its application. See Post, *supra*, at 42.

here. This Court's commercial speech cases have reasoned that regulation of speech is sometimes a necessary element of the government's role in regulating the buyer-seller relationship. When this rationale is inapposite, there is no basis for treating commercial speech differently from noncommercial speech. This Court held in *Cincinnati* v. *Discovery Network*:

> For if commercial speech is entitled to "lesser protection" only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge regulations on commercial speech.

507 U.S. 410, 416 n.11 (1993); see also *id.* at 418-23. See also *44 Liquormart* v. *Rhode Island*, 517 U.S. 484, 499-501 (1996) (Stevens, J.) (plurality) ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."); *Lorillard*, 533 U.S. at 576 (Thomas, J., concurring in part and concurring in the judgment) ("Even when speech falls into a category of reduced constitutional protection, the government may not engage in content discrimination for reasons unrelated to those characteristics of the speech that place it within the category.").

The government vaguely suggests that some unspecified *lesser* level of scrutiny than *Central Hudson*'s might apply, U.S. Br. 39, because "a requirement to provide money for commercial speech increases the total amount of information available to consumers." But a program with any other funding mechanism could have gotten the same information to consumers, and the money saved by objectors could have been used to advertise their own products, providing consumers with a more diverse array of information. In any event, increasing information flow to consumers is obviously not the only reason to protect commercial speech; rather, the speakers' rights matter too.

This case implicates none of the policies underlying the commercial speech doctrine. Neither the beef promotion program itself nor the requirement that producers pay to support it is designed to protect consumers from false and misleading information or from any other form of harm specifically related to the nature of the buyer-seller relationship. Contrast *Zauderer*, 471 U.S. at 651. Nor does the required support of speech here relate to any of the other reasons this Court has cited for the commercial speech doctrine. The supposedly greater durability of commercial speech is obviously irrelevant, because what is at issue in compelled speech cases is not the *risk* that anyone will be *discouraged* from uttering protected speech, but the *certainty* that some individuals will be *forced* to support speech with which they disagree. Nor is the objective verifiability of a category of speech relevant to whether objectors may be compelled to support it. In any event, the beef promotions' assertions that beef is delicious and is "what's for dinner" hardly represent objective statements comparable, for example, to the price of a product at a particular store. Thus, because the beef checkoff program has absolutely no connection to the rationale underlying the commercial speech doctrine, *Central Hudson* is inapposite.

B. The Beef Program Cannot Satisfy The *Central Hudson* Test.

In any event, the Beef Act cannot satisfy *Central Hudson*. That case set forth the following four-part test for the constitutionality of certain commercial speech regulations:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask *whether the asserted governmental interest is substantial.* If both inquiries yield positive answers, we must determine whether the regulation *directly advances the governmental interest* asserted, and whether it is *not more extensive than is necessary* to serve that interest.

447 U.S. at 566 (emphases added). Only the second, third, and fourth steps of this analysis, emphasized above, are relevant here. The Beef Act fails all three.

Petitioners' analysis to the contrary is unconvincing. First, they focus primarily on whether the beef *advertising* directly advances a substantial governmental interest. U.S. Br. 39-40; Nebraska Cattlemen Br. 40-42. That is the wrong question. Rather, "the *compelled funding* for the advertising must pass First Amendment scrutiny." *United Foods*, 533 U.S. at 411 (emphasis added). Petitioners' discussion (U.S. Br. 39-40; Nebraska Cattlemen Br. 40-42) of the economic and nutritional importance of beef is therefore immaterial unless they can prove that the checkoff requirement advances "to a material degree" the government interests to which petitioners point, *Ibanez* v. *Florida Dep't of Bus. & Professional Regulation*, 512 U.S. 136 (1994), and that the requirement is no broader than necessary to do so. Petitioners' attempts to prove such necessity—based on a "free-rider" theory and the fear of taxpayer backlash—are hopelessly flawed.

1. Free Riders. Petitioners argue that compelled funding is necessary to address a supposedly substantial government interest in overcoming "a collective action/free rider problem that limits the incentive for any one producer to pay for generic advertising for beef." See U.S. Br. 40-41 (citing *Lehnert*, 500 U.S. at 519); Nebraska Cattlemen Br. 44-46. This argument is, first of all, a purely speculative, *ex post* rationalization, and thus cannot suffice under *Central Hudson*. *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 625-26 (1995) (*Central Hudson* cannot be satisfied by "mere speculation and conjecture"); see also *Thompson* v. *W. States Med. Ctr.*, 535 U.S. 357 (2002); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 490 (1995) ("anecdotal evidence and educated guesses" do not suffice). Neither petitioner cites any evidence that Congress *actually* imposed the checkoff requirement as a response to a free rider problem, nor that it even thought such a

problem existed.[30] Congress's findings, 7 U.S.C. 2901, relate no such concern. In *United States* v. *Frame*, 885 F.2d 1119, 1135 (1989), relied on by the Nebraska Cattlemen (at 44), the Third Circuit's detailed inquiry into the Act's legislative history produced no such evidence; the court merely concluded that Congress was "presumably" trying to prevent free riders, but cited as evidence only the fact that a proposal for a voluntary assessment program received no support. The only other evidence of any such problem cited by petitioners is the testimony of one Beef Board adviser in this litigation, fifteen years after the Act was passed, hypothesizing that a voluntary program would not have worked. See Nebraska Cattlemen Br. 44 (citing J.A. 168-69). The *Lehnert* case is thus wholly inapposite: There, the free rider problem had been the most serious and well-documented obstacle to union organizing before the emergence of union shops and agency fee arrangements; the unions lobbied heavily about it; and Congress, having studied it extensively, was plainly concerned with eliminating it. See *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 761-64 & nn.13-14 (1961).

Here, even analyzed *ex post*, this rationale lacks any factual basis: there is no evidence that a beef promotion program relying on voluntary contributions—or at least permitting objectors to obtain refunds for fees unconstitutionally expended on speech—would not have been successful, as none has ever been tried. See Nebraska Cattlemen Br. 9-10 (explaining that

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[30] The government cites Congress's findings on commodity promotion generally in 7 U.S.C. 7401. U.S. Br. 17-18. These were passed in 1996, a decade after the Beef Act; include no findings specific to the beef industry; and are vague and conclusory. Moreover, they do not even describe the same collective action problem that petitioners assert exists—they say nothing about producers' disincentives to support voluntary commodity promotion programs, but simply note that, in the absence of *any* commodity promotion program, individual producers often lack the means or incentive to advertise. See 7 U.S.C. 7401(b)(7); *id.* § 7401(b)(10).

predecessor program, which would have allowed objectors to obtain refunds, never went into effect).[31] Unions have, after all, not been incapacitated from speaking by the requirement that they not compel objectors to support their speech unless it is germane to collective bargaining.

Second, the very notion of a free rider problem is question-begging in this First Amendment context, because those who refuse to support a message with which they *disagree* cannot in any meaningful sense be said to be "free riding" on that message. Indeed, a particularly troublesome assumption of the government's argument is that beef producers *cannot* legitimately disagree with the message of the Beef Act promotions. See, *e.g.*, U.S. Br. 38 ("Beef Act speech * * * involves the promotion of the very product that the persons assessed have chosen to produce and sell."). That assumption is surely wrong. Respondents *do* disagree with the message that foreign grass-fed beef is equivalent to American grain-fed beef. Other beef producers might well have other objections. Farms that pride themselves on raising beef in a humane manner might well oppose encouragement of a general increase in beef consumption on animal rights grounds. Cf. *Amicus* Br. of Rose Acre Farms 1-2 (Statement of Interest). Similarly, family farmers might oppose the checkoff on the ground that it primarily benefits centralized agribusiness. See *Amicus* Br. of Campaign for Family Farms 3-6. These producers are *dissenters*, not free riders.[32]

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[31] Nebraska Cattlemen assert (at 44) that the failure of the referenda on the voluntary program proves the collective action problem existed, but in fact the opposite is true: if beef producers really acted as selfish free riders, they would have voted *for* the voluntary program, and then not participated in it. It is not indicative of an intent to free-ride that producers voted not to give themselves the opportunity to do so.

[32] Even if it can be reasonably assumed that a commodity's producers in a *collectivized* industry without niche markets support ads promoting that commodity, the same assumption simply cannot

This Court has never held that compelled support of speech can be justified constitutionally simply on the basis that objectors might otherwise take a "free ride" *on the speech itself*. In its agency fee cases, the Court's concern has instead been that employees might free-ride *on the union's performance of its collective bargaining duties*, to which speech of a certain sort is germane. When speech is not "oriented toward the ratification or implementation of petitioners' collective-bargaining agreement," the Court has rejected free rider arguments even when the speech likely "benefited" the objectors. See, *e.g.*, *Lehnert*, 500 U.S. at 527. This Court has never second-guessed people's statements regarding the views they do and do not support; it should not do so now.

Finally, and fatally, the Beef Act is not narrowly tailored to solving a supposed "free rider" problem, for there is an obvious, less restrictive alternative that would have solved any such problem completely: Congress could have funded the beef promotions through general revenue. This solution should have been especially obvious because Congress had in fact already considered it before enacting the initial Beef Research and Information Act in 1976. See *Frame*, 885 F.2d at 1135; *Western States Med. Ctr.*, 535 U.S. at 371 ("[Under *Central Hudson*,] if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.").[33]

2. Taxpayer Backlash. The government's main objection to the obvious alternative of funding the program through general revenue is its theory that such expenditures might "undermin[e] the very support for the beef industry that [the Beef Act] sought to engender from the public," and—presumably—cause people to retaliate by eating less beef.

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be made in the highly differentiated beef industry. Contra U.S. Br. 39 (citing *Wileman Bros.*, 521 U.S. at 470).

[33] In this context, of course, "less restrictive" translates into "less coercive."

U.S. Br. 41. This "grocery-store-rage" theory has no support in the legislative record and must be rejected as mere *post hoc* speculation. It is also silly. The objective of the Beef Act was not to build goodwill toward the beef industry, but to convince people that they want to have beef for dinner. The two goals are quite different. Even if a tax-funded program would have been unpopular, there is no earthly reason to assume that disgruntled taxpayers would blame the program on the *beef industry* rather than on Congress—and would then change their eating habits as a result rather than, for example, voting their representatives out of office.

The legislative history of the Beef Act and its predecessor *does* reflect numerous statements by legislators praising the fact that the program would cost taxpayers nothing. See, *e.g.*, 121 CONG. REC. 38,114; 121 CONG. REC. 31,439. The concern appears to have been purely fiscal, unconnected to grocery store rage. See H.R. REP. No. 99-271, at 2 (1985). But the government does not even *attempt* to argue that simply saving taxpayers money constitutes a sufficiently "substantial" interest to satisfy *Central Hudson*—and such a rationale would itself compromise central First Amendment values. As we have seen, the expenditure of general tax revenue on government speech serves those values precisely because it puts in place a political check on government's abuse of its power to speak. The government's argument that taxpayers cannot be asked to fund the Beef Act because they might get angry about it amounts to a bold assertion that this program should be shielded from these political safeguards.

Finally, there is an obvious and less burdensome alternative solution to this problem—a program funded by voluntary contributions—to which, given the weakness of the free rider argument, petitioners offer no serious objection.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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